NTSB Order No.
EM-49

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 1st day of March 1976.

OWEN W. SILER, Commandant, United States Coast Guard,

vs.

OSVALDO TROCHE, Appellant.

Docket ME-48

OPINION AND ORDER

The appellant, Osvaldo Troche, has appealed from the decision of the Commandant affirming the revocation of his seaman's documents for misconduct aboard ship.[1] At the time in question, appellant held Merchant Mariner's Document No. Z-1275028 and was serving at sea, under authority thereof, as an oiler on the SS ELIZABETHPORT, a U.S. merchant vessel. The vessel was then returning from a Far Eastern voyage, headed for the port of Seattle.

Appellant's prior appeal to the Commandant (Appeal No. 2017) was from the initial decision of Administrative Law Judge Charles J. Carroll, Jr., issued at the conclusion of a full evidentiary hearing.[2] Throughout these proceedings, appellant has been represented by counsel.[3]

The law judge found that on May 18, 1973, appellant wrongfully assaulted and battered his roommate, one Petreu Lewis, with a knife when they were alone in their sleeping quarters on the vessel. It is undisputed that Lewis had to be hospitalized for the remainder

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[1]The instant appeal has been filed pursuant to 49 U.S.C. 1903(a)(9)(B).

[2]Copies of the decisions of the Commandant and the law judge are attached.

[3]By his own election, appellant was represented at the hearing by two law students affiliated with a legal aid society. However, he has retained private counsel for these appeals.

of the voyage and for an additional 33 days after the vessel's arrival in port on May 25.

Both seamen testified and were subjected to cross-examination. As the sole eyewitnesses, the offered sharply conflicting versions of the circumstances which led to the knifing, how the injury was inflicted, and by whom.

The law judge made a credibility finding in favor of the injured seaman. Accordingly, he found that appellant had a pocket knife in each hand and attacked Lewis, who was unarmed, without warning or provocation; and that he thereby inflicted a deep cut on the left side of Lewis' face. The cut was further described as "running from just left of [Lewis'] left eye to just left of the left side of his mouth."[4]

Appellant testified, in substance, that Lewis inflicted this unjury himself in a "freak accident." The law judge found appellant discredited by the vagueness of his testimony. A third witness, Bennie Drumgoole, upon hearing "a commotion" and entering the room, observed Lewis bleeding and appellant with knife in his left hand. No credence was given to his other testimony that neither seaman appeared angry or that both said the wounding was an accident at that time.

Based on these assessments, the law judge found that "the accident theory," upon which appellant relied for his defense, was not sustained. He thus concluded that appellant's misconduct was established under 46 U.S.C. 239(g), and entered the order of revocation.

In his brief on appeal,[5] appellant contends that the absence of provocation was not established through Lewis' testimony; that his own testony and Drumgoole's "belie the underlying truth of what in fact occurred;" that Lewis' violent personality and history of seaman's offenses render his credibility questionable, whereas appellant had an exemplary prior seaman's record for 7 years; and that appellant had no opportunity to refute Lewis' testimony. Based thereon, appellant urges that his case be remanded or that

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[4]I. D., 5. This is accepted rather than the law judge's incongruous reference to the right eye in describing the resulting scar (I. D., 6-7).

[5]The appeal, although untimely filed, was accepted upon appellant's showing, which was uncontested, that the delay was caused by inadquate service of the Commandant's decision.

the sanction be modified. Counsel for the Commandant has submitted a reply brief opposing these grounds for relief and urging our affirmance of the sanction.

Upon consideration of the briefs and the entire record, we conclude that the findings of the law judge are supported by reliable, probative, and substantial evidence. These findings, unless modified herein, are adopted as our own.[6] Moreover, we agree that the sanction is warranted under 46 U.S.C 239(g) and applicable Coast Guard regulations issued thereunder.[7]

Appellant's first contention is based on the argument that Lewis failed to show why the appellant would have knifed him "suddenly, for no reason." Lewis testified that both seaman had been resting in their respective bunks. A tape recorder was playing and there was no conversation. When the recording ended, Lewis jumped down from the upper bunk to change tapes. The appellant appeared to be sleeping in the lower bunk but at this juncture, according to Lewis, he jumped up suddenly and launched the knife attack in the manner found by the law judge.

Contrary to appellant's argument, we perceive no inherent contradiction or lack of logic in this description of a peaceful situation immediately preceeding the assault. We cannot assume automatically that in these circumstances such an act of violence could not happen.

In describing the confrontation itself, Lewis testified that appellant called him foul names and told him that "People are saying you're bad" (Tr. 52)[8] before slashing him, and threatened to kill him afterward (Tr. 53). This is sufficient to overcome appellant's objection that no reason for the assualt is ascertained from Lewis' testimony. More importantly, it constitutes a sufficient showing of the absence of provocation, particularly in

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[6]The Commandant's finding that "vocal threats arising from the ensuing struggle were overheard by ..." Drumgoole is challenged in appellant's brief. There is nothing in the record to support such a finding and it is therefore reversed. The Commandant's remaining findings, however, being in all respects similar to those of the law judge, are hereby affirmed.

[7]46 CFR 5.03(b)(1); 5.20-165, Group F.

[8]Lewis also testified that appellant had learned in one of their recent conversations that Lewis had beaten up a friend of his some 2 years previously.

the context of this case where the defense of provocation was not raised, and the record contains no evidence whatsoever of any provocative conduct on Lewis' part.

Appellant excluded the defense of provacation by testifying generally that it was Lewis who brought out the knife to show him "this judo hold--the ship took a roll and [Lewis] cut himself" (Tr. 33). No reason is offered by him on appeal, and we find none upon review of the record for disturbing the finding wherein the law judge rejected this defense.[9] Nor do we regard the injured seaman's account of the uprovoked attack as so improbable that we would question the credibility findings of the law judge.

Appellant makes no attempt in his brief to argue the merits of his former defense. Instead, he now claims in his second contention that he and Drumgoole testified as they did only to protect Lewis. Presumably, appellant is referring to their espousal of the knifing-by-accident theory at the hearing. The only showing made here is that these witnesses did not wish to jeopardize Lewis' livelihood, since he was then sailing under a temporary document while appealing from a sanction entered against him in another case. Appellant does not state whether, or to what extent, his sworn testimony and that of Drumgoole may have been fabricated. In any event, the contention itself tends further to destroy their credibility and in no way inclines us to disturb the findings of the law judge.

We do not regard in the same light Lewis' unsworn statement made on May 24 aboard ship although it agrees with appellant's direct testimony. Lewis testified that he gave this statement so that appellant would not lose his document but then retracted it on the following day in a sworn statement taken by FBI agents, who convinced him that a self-inflicted knifing "did not make sense" (Tr. 65). In our view, the law judge could properly accord Lewis' sworn testimony greater weight than his prior inconsistent

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[9]The record discloses that appellant confined himself to a general description of the manner of wounding in his direct testimony. Although pressed for details thereof on cross-examination, he expanded very little. He stated only that Lewis "was trying to tell [him] how to grab somebody's arm and twist it--twist it and put pressure on it" (Tr. 41); and then "The ship rolled and we went together, then knowing that he had the knife, I let him go. I tried to let him go. But that's when I started seeing all that blood coming down" (Tr. 42). We agree with the law judge that these few meagre details provided no basis whatsoever for finding that the injury to Lewis was accidentally self-inflicted.

statement which was unsworn.

Appellant's third contention questions Lewis' credibility by reason of the sanctions he has received for seaman's offenses in other cases. It was brought out on cross-examination that his documents were suspended on one occasion (in 1971) for assault with a glass container while intoxicated, creating a disturbance, and using foul language aboard ship. On this appeal, it has been further shown that he received a suspension for engaging in mutual combat and failure to obey an order on May 24, 1973, aboard the ELIZABETHPORT; and that in January 1974, his documents were revoked by this law judge in another case of assault and battery with a flashlight aboard the SS SEATRAIN WASHINGTON. The nature of these offenses would clearly reflect a propensity for violence on Lewis' part. However, it is well settled that such offenses do not indicate "an impairment of the trait of veracity."[10] We do not find that the law judge abused his discretion by disregarding this type of collateral evidence, particularly since the character trait shown lacked any relevance in view of appellant's defense.

With respect to his fourth contention, appellant offers no reason and none appears in the record for his failure to appear during Lewis' testiomony. The record includes appellant's summons to the hearing served by the Coast Guard on May 25, 1973. His signature thereon acknowledges, inter alia, that Coast Guard regulations would require the hearing to be held in his absence if he failed to appear.[11] Although so advised at the outset, appellant nevertheless absented himself at this critical stage of the hearing.[12] Appellant's legal representatives conducted the examination of Lewis, and the case was continued for 1 month thereafter by the law judge pending the submission of proposed findings and conclusions by both sides (Tr. 85-6). During the intervening period, no request was made to recall appellant for the purpose of refuting Lewis' testimony. It is apparent that the rights of confrontation and rebuttal were not denied to appellant by rather that they were abandoned by him. We find no denial of due process.

Finally, in assessing the sanction, we have considered appellant's commendable prior seaman's record. Nevertheless, we are convinced that the revocation action is the appropriate

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[10]3A Wigmore, Evidence § 982.

[11]46 CFR 5.20-25.

[12]Appellant chose to testify at an earlier session of the hearing while Lewis was still in the hospital.

remedial sanction for the offense found proved in thi instance, involving an unprovoked, surprise attack with a knife upon a fellow crewmember.[13] We agree with the Commandant's determination that appellant has displayed a lack of self-restraint which would adversely affect safety and the welfare of other seamen if he contined to serve at sea.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied; and

2. The order of the Commandant affirming the revocation of appellant's seaman's documents by the law judge be and it hereby is affirmed.

TODD, Chairman, McADAMS, THAYER, BURGESS, and HALEY, Members of the Board, concurred in the above opinion and order.

[13] Commandantv. Velazquez, 1 N.T.S.B. 2261 (Order EM-17, 1971).